

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

ROBERT W. ELLIOTT,

*Petitioner,*

vs.

J. BENEDETTI, *et al.*,

*Respondents.*

3:09-cv-00265-LRH-RAM

ORDER

This habeas matter under 28 U.S.C. § 2254 comes before the Court on petitioner's motion (#31) following upon the prior order (#30) holding, *inter alia*, that certain claims were not exhausted.

Petitioner ultimately seeks therein the dismissal of the unexhausted claims. The Court's prior order, in pertinent part, gave petitioner thirty days within which to move either for dismissal without prejudice of the entire petition, for partial dismissal only of the unexhausted claims, "and/or for other appropriate relief." Petitioner queries "what other relief he could seek," and he posits that he "is given no choice but to" dismiss the unexhausted claims. The law is clearly established that it is not the Court's role to advise petitioner as to potential options in this context. The prior order referred to "other appropriate relief" in order to not restrict the range of relief that petitioner potentially might request under the controlling law. The Court has neither restricted nor affirmatively misled petitioner as to the relief that he might request. It again is not the Court's role to advise petitioner in this regard. If he believes that he "has no choice" but to move for dismissal of the unexhausted claims, that subjective belief is not the result of advice from this Court or restrictions imposed by this Court.

1 The Court accordingly will grant the motion to the extent that it seeks dismissal of the  
2 unexhausted claims.

3 To the extent that petitioner requests leave to file, *inter alia*, future pleadings and evidence, Rule  
4 5 of the Rules Governing Section 2254 Cases allows petitioner to file a reply to an answer if one is filed,  
5 and he may file an opposition to any motion to dismiss filed. No order from the Court is necessary to  
6 make appropriate filings in this regard. Any amendments to the pleadings are governed by Rule 15 of  
7 the Federal Rules of Civil Procedure.

8 The Court's prior order denying petitioner's motion for appointment of counsel stands.

9 IT THEREFORE IS ORDERED that petitioner's motion (#31) is GRANTED solely to the extent  
10 that Grounds 5, 8 and 9 are DISMISSED without prejudice.

11 IT FURTHER IS ORDERED that respondents shall file a response to the remaining grounds  
12 in the petition – as described in the prior order (#30) and pursuant to paragraphs (2) and (3) on pages  
13 2-3 of the scheduling order (#11) – within forty-five (45) days of entry of this order.

14 IT FURTHER IS ORDERED that petitioner shall have forty-five (45) days from service of the  
15 response within which to mail for filing either an opposition to a motion to dismiss or a reply to an  
16 answer. This deadline shall override any shorter deadline in any later form order issued pursuant to the  
17 *Klinge* decision.

18 DATED this 12th day of May, 2011.



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22 LARRY R. HICKS  
23 UNITED STATES DISTRICT JUDGE  
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